

Supreme Court, U.S.
FILED

No. 05-

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IN THE OFFICE OF THE CLERK
Supreme Court of the United States

JONATHAN JAY POLLARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the District of Columbia Circuit, in a two-to-one ruling, held that the doctrine of separation of powers precludes the exercise of subject matter jurisdiction, by a United States district court, over a defendant's post-conviction motion to allow his successor counsel access to classified docket materials considered by the district court prior to sentencing, if the purpose of the desired access is to enable counsel to study the court record in order to make an application for executive clemency. The Court of Appeals reached this conclusion *sua sponte* even though the district court's protective order, pursuant to which the documents were placed under seal, expressly contemplated access by successor counsel with court approval.

The Court of Appeals held that, because the objective of the desired access was to enable counsel to prepare a clemency application with knowledge of the full court record, and because the decision whether or not to grant clemency is constitutionally allocated to the Executive Branch, it would somehow violate the doctrine of separation of powers if the court were to exercise its jurisdiction in order to decide whether or not to grant the motion for access to the court's own docket.

This extreme and unprecedented application of the doctrine of separation of powers is incompatible with longstanding principles established by this Court, and is in conflict with the approach to the doctrine followed in the Fourth, Fifth, Sixth, and Ninth Circuits.

This petition, which implicates the fundamental issue of the scope and breadth of the doctrine of separation of powers, presents the following question:

Where a federal district court has placed classified court docket materials under seal pursuant to a protective order which expressly provides for future access to the docket materials with court approval, does the separation of powers doctrine mandate that the court lacks subject matter jurisdiction to allow security-cleared successor counsel access to its docket materials simply because counsel's objective in seeking access is to study the court record in order to prepare and submit a clemency application?

THE PARTIES

The parties below are listed in the caption. In addition, the following appeared below as *amici curiae* on behalf of petitioner Jonathan J. Pollard: The National Association of Criminal Defense Lawyers; The American Civil Liberties Union of the National Capital Area; the American Association of Jewish Lawyers and Jurists; and various law professors and other distinguished individuals.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit dated July 22, 2005 is reported at *United States v. Pollard*, 416 F.3d 48 (D.C. Cir. 2005) (Appendix A).

The Court of Appeals affirmed:

(a) A Memorandum Order of the U.S. District Court for the District of Columbia dated and filed January 12, 2001, which denied Pollard's Emergency Motion to Add to List of Defense Counsel Authorized to Access Sealed Docket Materials Pursuant to Protective Order. (Not reported.) (Appendix C) (A-440)¹

(b) An Order of the ~~U.S.~~ District Court for the District of Columbia dated August 7, 2001 and entered August 9, 2001, which denied Pollard's Motion for Reconsideration of the January 12, 2001 Memorandum Order. (Not reported.) (A-635)

(c) An Order of the U.S. District Court for the District of Columbia, filed November 12, 2003, which denied Pollard's Motion for Modification of the Court's January 12, 2001 Memorandum Order Based Upon the Government's August 3, 2001 Letter. This Order is reported at *United States v. Pollard*, 290 F. Supp. 2d 165 (D.D.C. 2003). (Appendix B) (A-866)

1. Citations in the form "A-__" are to the Joint Appendix below.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals entered its opinion and order on July 22, 2005. Petitioner filed a timely petition for rehearing *en banc*, which was denied on November 10, 2005. See *United States v. Pollard*, 2005 U.S. App. LEXIS 24393 (D.C. Cir. Nov. 10, 2005) (*per curiam*).

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On July 22, 2005, a divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed, on separation of powers grounds, Orders of the United States District Court for the District of Columbia which denied the motion by petitioner Jonathan J. Pollard to allow his security-cleared counsel access to classified pre-sentencing memoranda and related materials that had been filed with the district court in 1987 (the "Access Motion"). The documents had been placed under seal pursuant to a protective order (A-72) (the "Protective Order") which explicitly contemplated future access by, *inter alia*, successor counsel with proper clearance, subject to court approval.

Petitioner was sentenced to life in prison in 1987, following a guilty plea. Prior to sentencing, the Government and the defense (through prior counsel) submitted pre-sentencing memoranda to the Court. Classified portions of the memoranda were redacted by the Court Security Officer. The redactions totaled approximately 40 pages. The unredacted materials (the "Docket Materials") were placed under seal by the district court pursuant to the Protective Order.